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SUPREME COURT OF THE UNITED STATES

OCTOBER 1954 TERM

No._____

VIRGIL D. WILLIS — Petitioner and Appellee Below

Vs.

UNITED STATES OF AMERICA, — Respondent and Appellant Below

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Eighth Circuit

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes Virgil D. Willis and respectfully petitions this Honorable Court to grant a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit, rendered and entered March 18, 1954 in this cause lately pending therein, styled, United States of America, Appellant, vs. Virgil D. Willis, Appellee, being No. 14,827 of causes on the docket of said Court of Appeals, and which said judgment reversed the judgment of the United States District Court for the Western District

of Arkansas, Harrison Division which was in favor of your petitioner and against your respondent herein, and which said Court of Appeals judgment became final on the date of the rendition.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS, HARRISON DIVISION AND OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The opinion of the trial court, United States District Court for the Western District of Arkansas, Harrison Division, in this cause therein pending as United States of America vs. 209.25 Acres of Land, more or less, situated in Boone County, Arkansas, being Civil Action 283, was rendered and entered November 13, 1953, and is reported in 108 Fed. Supp. 454 (R.49 to 64). New trial denied January 21, 1953, (R. 199-204).

The opinion of the United States Court of Appeals, reversing the judgment of the United States District Court, which had set aside its judgment vesting title in the United States of America as to petitioner's Tract O-1468, dismissed the petition of the United States and declaration of taking of petitioner's land, and revested title to the same in petitioner as against the United States, is reported in 211 Fed. 2d____, Federal Reports, May 3, 1954 and appears in R. 218 to 224. Rehearing denied and order entered thereon by the United States Court of Appeals April 2, 1954. (R. 231). Order stay-

ing the mandate for thirty days from date made and entered April 19, 1954. (R. 231).

STATEMENT OF THE GROUNDS ON WHICH PETITIONER SEEKS TO INVOKE THE JURISDICTION OF THE COURT

1. That Petitioner has been deprived of inalienable rights guaranteed him by the Constitution of the State of Arkansas under its Declaration of Rights, Article 2; Section 22, (Constitution of Arkansas, Declaration of Rights, Article 2, Section 22; Arkansas Statutes 1947 at page 45); as well as by the Constitution of the United States, Fifth Amendment, Section 1, and the Fourteenth Amendment, Section 1. (Appendix 31) in that petitioner's lands are being taken for a "non-public use" as plead in petitioner's Motion for Preliminary Determination of Fact, (R. 15 to 17 at page 17); as renewed in his Answer (R. 20 to 22); as disclosed by the testimony; (R. 25 to 47) (Plaintiff's Ex. 2. P 45 and Defendant's Ex. 2, P. 47) and Petitioner's (Appellee's) Supplement to the Record. (R. 209 to 215); and as found by the trial court (R-59).

2. That Respondent, (United States, Appellant below) through the Secretary of the Army, was authorized to take only lands necessary for Bull Shoals Dam and Reservoir Project. (The Act of June 28, 1938, Sec. 2, 52 Stat. 1215, as amended; 33 U.S.C. Sec. 701c-1) (Appendix 31-32), and that the Record negatives any necessity for the use of Petitioner's lands for Bull Shoals Dam or Reservoir as authorized by Congress.

3. To render a decision of first impression as to whether an administrative officer, clothed by action of Congress with authority to take only the lands necessary for an isolated dam and reservoir, can invoke this political power of Congress so as to immunize by declaration of "necessity" alone his action against judicial review upon issues timely joined by the land owner that such taking was arbitrary, capricious, unnecessary, done without adequate determining principle and in bad faith and for the purpose of private enterprise and for a non-public use.

4. That the decision of the Court of Appeals, to which your petitioner prays that this Writ should be directed, amounts to a declaration of law that the action of taking lands by an administrative officer, clothed with authority to take only such lands as were necessary for an isolated dam and reservoir, could not be judicially reviewed as against his declaration of "necessity" after issues timely joined by the land owner, (Court of Appeals opinion, R. 218 to 223), alleging that the agency (Secretary of the Army) acted in bad faith and so capriciously and arbitrarily in taking the lands that his action was without sound determining principle or unreasoned, and that the taking of petitioner's lands was for non-public use, thus your petitioner would respectfully say that such holding by the Court of Appeals was error in light of this Court's opinions in United States v. Carmack, 329 U.S. 230, S. Ct. 252, 91 L. Ed. 299 (1946); United States ex rel T.V.A. v. Welch, 327 U. S. 546 (1946); and Cincinnati

v. Vester, 281 U. S. 439, 50 S. Ct. 360, 74 L. Ed. 950, (1930).

5. That the opinion and judgment of the United States Court of Appeals for the Eighth Circuit, to which your petitioner prays that a writ of certiorari issue, is in conflict with the opinion and judgment of the United States Court of Appeals for the Fifth Circuit involving the same question in United States vs. Richardson, rendered May 6, 1953 and reported in 204 Fed. 2d Ser. 552; and that these respective Courts of Appeal have decided an important question of federal law which has not been, but should be settled by this court.

6. The petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit in this case should issue because its opinion clearly indicates that a land owner whose land has been taken under the limited power granted by Congress (The Act of June 28, 1938, sec. 2, 52 Stat. 1215, as amended (33 U.S.C. sec. 701-c-1) has no right to have the actions of the Secretary of the Army and the Corps of Engineers reviewed by the courts, regardless of whether the owner's lands were necessary for the dam and reservoir or regardless of the underlying motives for taking if the Secretary of the Army and the Corps of Engineers had made the simple declaration of "necessity", and in so holding, the Court of Appeals for the Eighth Circuit disregarded the undisputed fact, as found by the trial court, that the lands had no purpose in con-

nection with the dam and reservoir, were taken for Home and Club Sites, and contrary to the rule and plan and practice announced and followed by the Secretary of the Army and Corps of Engineers in the taking of the other lands for Bull Shoals Reservoir, and that the taking was arbitrary, without sound determining principle, was capricious, for a non-public use and in violation of petitioner's constitutional rights as guaranteed by the Fifth and Fourteenth Amendments' due process clauses.

7. That the holding by the Court of Appeals that regardless of whatever might be the validity otherwise —which it need not decide—of the considerations on which the trial court relied, as indicating that the administrative determination, had been without adequate determining principle, and had been unreasoned, such factors could not in any event be allowed to control the question of arbitrariness and capriciousness without taking into account the reality to which they had referred; viz, an 80.9 acre tract of land extending as a peninsula, 1900 feet (the Record, Schedule B. at page 11 shows it is three quarter quarters, 2960 feet in length, 660 feet at the narrowest place in width and one quarter at the widest) into the heart of the reservoir and that it was without access by land except through another State, was error, first because it is respectfully submitted that these were not the only issues of fact which the trial court had before it, and if they had been, the record is undisputed that there were

many realities similar and more of considerably less acreage and not over 330 feet wide jutting into the reservoir which were left to private ownership under the limited congressional authority, and none of which were selected for taking except your petitioner's.

STATEMENT OF FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

Prior to November 10, 1950, your petitioner owned 80.9 acres of land in Boone County, Arkansas in fractional Sections 16, 21 and 22, Township 21 North, Range 18 West, left bank of White River. (Legal description, Rec. 65-66). This tract is bounded on the north by the Missouri-Arkansas state line. Petitioner also owns an acreage adjacent to this tract in the State of Missouri which Missouri acreage is not involved. This tract is 3960 feet north and south and varies in width from 660 feet to one-fourth mile. (Schedule B. to Government's petition, Rec. 11). This land is all above the 700 foot level except three places which are slightly below this level and which does not exceed one-fourth acre in area. (Schedule B. to Government's petition, Rec. 11) (Defendant's Exhibit 2 - Rec. 47).

The tract is traversed by well improved roads from Missouri and is easily accessible from Missouri's hard surfaced Highway No. 80 from the county seats of Ozark and Taney. There are two dwelling houses, one on the 80.9 acres in Arkansas and one on the ten acres in Missouri. The Arkansas portion has about 18 acres

of good, cultivatable land and the whole tract is an economic unit. (Rec. 36).

On November 10, 1950, the Secretary of the Army filed his ex parte petition and Declaration of taking in District Court for the Western District of Arkansas to take that portion of petitioner's lands (80.9 acres) located in Arkansas, alleging, "the lands were necessary in his opinion to provide for the construction and operation of a flood control dam and reservoir and for such other uses as may be authorized by Congress or by Executive Order." (Rec. 1-11 at page 2 and 9). With the petition and declaration there was filed a map showing the plan of taking in the area. This was marked Schedule B (Rec. 11). This schedule disclosed the power level contour (654') lines and the flood control contour (700') lines and their relative positions with relation to the land necessary to be acquired for the purpose authorized by Congress; viz, lands necessary for dam and reservoir projects, provided, that lands should include lands on which dams and reservoirs are located. (Act of June 28, 1938, 33 U.S.C. sec. 701c-1, Appendix 31-32).

On November 10, 1950, the District Court rendered a judgment vesting title to petitioner's 80.9 acres in Arkansas in the United States. (Rec. 13-14).

On May 11, 1951, within the time as prescribed by law after summons served on your petitioner, he filed his motion for preliminary determination of fact, and orders thereon. On June 21, the Government filed a

motion to strike petitioner's motion, challenging its right to acquire the land, denying the allegations of fact and pleading that the declaration of taking filed on November 10, 1950, and judgment thereon vesting title in the United States of America was not subject to judicial review and pleading that subsequent to the acquisition program of the Bull Shoals Dam and Reservoir project, tract ownership information was obtained and all tracts in the reservoir platted by segments and, at the time Tract No. O-1468 was a part of Tract No. 1405 which comprised a total of 209.25 acres and that in the refinement of the taking line, determination was made by proper authorities that it would not be feasible to eliminate any of the 209.25 acres, since any remaining part thereof was not considered an economic unit and also plead that petitioner's tract (80.9 a.) was vitally essential in the operation of said dam and project for all uses, including essential collateral uses. (Rec. 18-19)

It will be observed that the petition and declaration of taking were filed prior to the effective date of Rule 71A, Federal Rules of Court Procedure, and process was served on petitioner prior to said date.

On July 9, 1951, the court overruled government's motion to strike (Rec. 18), and subsequent to the effective date of Rule 71A, supra, the petitioner was granted permission to file an answer under Rule 71A(c) in which he adopted all of the allegations in his original motion and further alleged an accurate

description of this land in tract No. O-1468, that the Secretary of the Army was authorized to take only such lands necessary for Bull Shoals Dam and Reservoir but that his lands were not necessary for Bull Shoals Dam or Reservoir and that the selection thereof was made for use only for recreational purposes and that a public declaration had so been made prior to the declaration of taking; that the selection was void of reason and judgment and in violation of petitioner's rights guaranteed him by the Constitution of both the State of Arkansas, Article 2, Sections 8-22, and of the United States of America, Fifth Amendment, Section 1, and Fourteenth Amendment, Section 1; that respondent's "public use" declaration was capricious, arbitrary and without sound determining principle and amounted to bad faith, and further that the determination by the Secretary of the Army that said lands were necessary, useful and advantageous to the United States was arbitrary, not based on fact, was an abuse of discretion, arbitrary, capricious and amounted to bad faith.

That the taking was inconsistent with and contrary to the established and demonstrated practice and policy of the Secretary of the Army in the taking of other lands along and adjacent to the Bull Shoals Reservoir in that, as shown by the records of the court in the proceeding for the taking of other lands for Bull Shoals Reservoir purposes, and as shown by the Government's map (Schedule B to the petition for taking, Rec. 11), the Secretary had consistently avoided the

taking of private lands which were situated higher than 700 feet elevation, and when not physically isolated from other privately owned lands and that said policy had resulted in numerous cases where the taking line was permitted to run as to comparative (infinitesmal areas), below the 700 foot contour level.

Upon these issues the cause was tried to the court and both parties introduced testimony and various exhibits in support of the contentions and as found by the trial court the following undisputed facts appeared from the testimony:

The defendant, prior to and at the time of the filing of the petition and declaration of taking by the government, was the owner and in possession of the tract of land herein involved. It is situated approximately 26 air miles and 42 river miles above the location of the dam. The controlling contour line used by the government in selecting and acquiring the lands for the construction and operation of the dam and reservoir is the 700 foot mean sea level line. All of the lands which the government is taking from the defendant is above the 700 foot contour line with the possible exception of three tracts of not more than one-quarter of an acre each, situated in short, deep and steep ravines leading down to the lake or reservoir. The lowest elevation along the entire west boundary is 806 feet. That elevation varies from 806 feet to 836 feet mean sea level with the exception that on the east side are situated the three exceedingly rough, steep ravines that cross the east boundary, and the contour line of 700 feet extends into those ravines to the extent of less

than one-quarter of an acre in each as above stated.

The Corps of Engineers originally prepared a planning report for the reservoir which included 140,870 acres. Later the acreage was reduced to approximately 101,000 acres. In the original plans contiguous lands owned by one ownership were platted as one tract and in 1949 the Engineers showed the defendant's land as a part of tract O-1405, comprising 209.25 acres, and the Engineers recommended that all of tract O-1405 be acquired. Prior to the filing of the petition and declaration of taking it was ascertained that tract O-1405 was owned by various people and the 209.25 acres were resurveyed and platted in accordance with the individual ownership. This required the original acreage to be placed in four different tracts, to-wit: tract O-1405, lying west and south of the defendant's tract and containing 76.7 acres; tract O-1466, containing 3.4 acres and joining defendant's tract on the northeast; tract O-1467, containing 48.25 acres and joining defendant's land on the east of the south end; and tract O-1468, which is rectangular in shape, being 1980 feet long north and south, containing 80.9 acres, owned by the defendant.

Most of each of the tracts, O-1405, O-1466 and O-1467 lie below the 700 foot contour line, and the part that lies above said land joins defendant's land.

The 654 foot contour line marks the permanent operating level of the water in the reservoir. The water will not reach the 700 foot contour line except in times

of flood, and then the water will be allowed to rise to that line but will not remain at that height more than a few days.

The north line of the defendant's tract is the boundary line between the States of Missouri and Arkansas, and it adjoins land owned by the defendant situated in the state of Missouri. There are 18 or 20 acres of the tract in cultivation and capable of producing any kind of crops grown in that area. A good gravel country road enters the land on the north end and crosses the entire tract in a southerly direction. The gravel road leads from one of the main hard-surfaced highways in Missouri and formerly extended to a public ferry across White River south of the defendant's land.

The testimony does not show the exact distance from the boundaries of defendant's land to the 700 foot contour line, but the distance between the contour line and the boundaries of defendant's tract is considerable except in the three ravines as heretofore stated.

Exhibit three introduced by the defendant is a map prepared by the United States Army Engineers and shows the location of the four tracts above mentioned. It shows the 700 foot contour line, which traverses tracts O-1405, O-1466 and O-1467, to be several feet below and a considerable distance from the boundary between those tracts and the tract of defendant.

Exhibit one introduced by the defendant is a map

prepared by the Army Engineers and shows the location and boundary lines of defendant's land and the 700 foot contour line. It also shows the small indentations where the said 700 foot contour line crosses the east boundary line of the defendant's land in the ravines heretofore mentioned.

At the time of the filing of the petition and declaration of taking, two farm houses were situated on defendant's land. The houses were not in a good state of repair but were occupied by tenants living on the land.

Mr. Howard C. McKinney, Chief of the Real Estate Division of the Corps of Engineers, testified for the government. He had been employed in such capacity for approximately three years and in other capacities for eleven years. The Corps of Engineers recommended to the Secretary of the Army that the entire acreage of 80.9, owned by the defendant in Arkansas, be included in tract O-1468, but his adjoining land in Missouri was not included. It was the opinion of the Chief of Engineers that the land was necessary to the proper operation of the dam and reservoir project.

On August 22, 1950, there was a public meeting at Harrison, Arkansas. At that time government' exhibit two, which is a map of the entire reservoir area, was exhibited to the public. On that map the tract of land in question was designated as "Blue Hole Home and Club Sites." Other sites are shown throughout the reservoir area to be used for other purposes, and

it was proposed to utilize the defendant's land for home and club sites.

The witness also said:

"The reservoir boundary for the reservoir is blocked out on sectional subdivision lines to include the controlling contour and follow the most feasible sectional subdivision lines or property ownership lines, in order to minimize disturbance, an economic disturbance, and also considered is any parcels that might be left as to their feasibility for use. Their economic value. And in order to avoid excessive severance damages. The area around the water line is acquired for the operation and maintenance of the project."

The witness further testified:

"As a project is placed in operation all the lands above the permanent pool are utilized and some of it is permitted to go back * * * to revert to forest, some of it is leased for agricultural and grazing purposes, and some of it for boat docks and some for development for recreation. I said after the project is placed in operation. Of course those studies go on with the acquisition."

The witness testified that they were compelled to divide the original tract O-1405 into the tracts as hereinbefore stated in accordance with the individual ownership, and then said:

"Since all of that happened after we had made our appraisals and tried to negotiate on the 1405 as a 209

acre parcel, we felt that the acquisition should go ahead because a part of that was in the low areas and subject to inundation. So therefore we submitted the recommendation in the declaration of taking on just those four parcels for immediate possession. We did that on the 30th of June, 1950. We do not consider that any part of the original tract O-1405 is an economic unit. The investigation of the Engineers in reference to the particular tract involved here did not disclose that the defendant owned other adjoining land in Missouri."

In answer to a question propounded by the Court as to whether tract O-1468 was laid out with the thought in mind of selling the land, after the reservoir filled, to private individuals for homes or to private clubs for construction of club houses, the witness answered:

"That is not proposed for sale. That is proposed for sale similar to Mallard Point on Norfork where the government lays out an access road an delineates lots or at least at Mallard Point they run about an acre each and each of them face on an access road and each of them face on water and they rent those to individuals for home sites on a 25 year lease at a nominal, not a nominal figure, but a reasonable figure for the rent of the land. Those rentals over there run from $15.00 to $50.00 a year for the land and they have some developments up to fifteen and twenty thousand dollars."

A general information bulletin put out by the Corps of Engineers in July, 1950, expresses what they had

in mind. The bulletin states:

"Home and Club Site Area. This area bordering the lake will be subdivided into lots for lease to private individuals or private clubs for the construction of summer homes and clubs. Access roads on government owned land will be provided by the Corps of Engineers. Provisions for electric power, water supply and sanitary facilities will be the responsibility of each individual or club, individually or collectively, and leases will normally be for 25 year duration. Lessees will be required to obtain prior approval of the District Engineer on all structures to be constructed and also required to comply with the state health and sanitary requirements."

In another case in this Court where a somewhat similar question was involved, the government, in answer to an interrogatory propounded by the landowner as to the contemplated use of land lying above the 700-foot contour line, stated:

"Areas of fringe tracts cannot be increased for the purpose of acquiring lands for recreational uses only. The sole purpose for which the lands in Tract No. P-1523 were acquired for the Bull Shoals Dam and Reservoir project was for the operation and maintenance of the reservoir and no consideration was given to the procuring of any of the lands for recreational projects." Copied from the record in Civil Action No. 306, Harrison Division, where the landowner contested the right of the Government to take certain fringe

or remnant tracts lying above the 700 foot contour line.

The landowner, Virgil D. Willis, testified that in his opinion the land involved herein constituted an economic unit, especially when used in connection with land owned by him and joining on the north the tract involved.

There was also introduced by the defendant exhibit number one, a mosaic aerial photograph bearing a 1950 date, numbered eight, prepared by the Corps of Engineers, showing the 700-foot contour line, the 654-foot contour line and the boundary lines of the land taken by the Government. Mr. Willis testified from that map and from his own personal knowledge that in many instances the perimeter of the land taken crosses or intersects the 700-foot contour line. The map only showed the immediate area of this land and disclosed that the taking line crossed the 700-foot contour line in more than 60 places on other lands. Such practice prevailed throughout the entire reservoir area, and at no place did the government take land, lying above the 700-foot contour line, in any such amount as that which it seeks to take in this action. Remnants or fringe parcels, not in excess of 10 acres, lying above the 700-foot contour line, were taken along with the adjoining land when in the same ownership. When the taking line crossed the 700-foot contour line the small areas lying in ravines and other such places were disregarded and not taken.

In this connection, Mr. McKinney, the witness introduced by the government, testified that the purpose was to block around the 700-foot contour line. "When you get back in a densely wooded area and up a deep ravine you cut across." Economic considerations were involved. The 700-foot contour line was the controlling line. He further said:

"Well, there is no cut and dried rule for it. We are required to buy enough land for the operation of the reservoir. That it, our operation and maintenance of the reservoir. We are also supposed to follow good real estate practices and adjust the taking line to avoid excessive severance damages. Also to eliminate the remainder of the tract being left that is not economically feasible to the operation. So all of those things enter into it and you can't go back and tie to one of them, except for the fact that we are required to buy enough land for the operation of the reservoir."

At the conclusion of the testimony the parties stipulated that should the Court hold that the government had the right to take the entire tract; that the land was taken for a public use; and that the government had not acted in bad faith or so capriciously and arbitrarily that their action was without adequate determining principle or was unreasoned, that just compensation for the land should be $1,800.00.

THE FINDINGS OF THE TRIAL COURT ON THE UNCONFLICTING TESTIMONY SHOULD NOT HAVE BEEN DISTURBED BY THE COURT OF APPEALS

While it is doubtful that the factual situation was at all persuasive, the Court of Appeals did say that the Government had argued matters of evidence to which it had given consideration, yet your petitioner has concluded that such phraseology was used in the opinion because the Government did not choose to rely upon its request for relief on the pleadings. In this connection the opinion was concluded with the following:

> "The Government has asked us to declare that the Court should have denied relief upon the pleadings, but it did not choose to make such a stand itself, and in its brief it has argued matters of evidence to which we have given consideration." (Rec. 223).

It is urged that the findings of the Trial Court should not have been disturbed unless they were so clearly against the weight of the evidence as to be unwarranted as a matter of law. If they were unwarranted as a matter of law, then it is submitted that the Court of Appeals fell into error in reversing the Trial Court by inversely holding, as a matter of law, that the judgment of the Secretary of the Army was immune from judicial review after he had selected petitioner's lands by the simple declaration that they were necessary, when his only authority, as authorized by Congress, was to take the lands necessary for Bull Shoals Dam

and Reservoir; Provided that the lands should include lands upon which the dam and reservoir were located (33 U.S.C. sec. 701c-1).

After taking petitioner's lands for their actual use as Club and Home Sites in violation of the congressional mandate to take only the lands necessary for the dam and reservoir and with the further admonition that this meant lands upon which the dam and reservoir were located, the Government was forced to admit there were no uses, or at least it knew of none, for Mr. McKinney, Chief of Real Estate Division, Corps of Engineers, the only witness for the Government, said the use was going to be for Club and Home sites for private leasing and that he knew of no operational use for petitioner's lands. The following question was propounded and answer given.

> Q. Why is this 80 acre tract, all situated above the 700 foot contour level necessary to the operation of the reservoir when this map and all of your segment maps here show that the consistent policy and with no exceptions that I can find, cuts almost exactly to the 700 foot contour level?
>
> A. They are required to buy enough land for the operation and maintenance of the reservoir. They are also required to follow good real estate practices and to adjust the taking line to avoid excessive severance damages by taking an entire tract rather than taking a part and leaving an uneconomic unit. (Rec. 29-30-31)

The Corps of Engineers did not know that your petitioner was left with 10 acres of his own land adjacent to this 80.9 acres which amount left was not an economic unit. (Rec. 214)

Your petitioner did not purchase the lands for Club and Home Sites. Neither did he have any information with reference to the reservoir area prior to the time he was served with summons in this cause except the general information that Bull Shoals Reservoir would exist somewhere above the old river bed when the lake was filled and there is nothing in the record to indicate to the contrary. When he purchased the lands he notified the Corps of Engineers at Little Rock, because, being an attorney, he knew it was necessary for the Corps of Engineers to have ownership records of all lands for considerable distance in order to complete its planning record.

Your petitioner's land was a farm consisting of 90.9 acres. It was leased as such and it is suggested that he was better informed as to whether it was an economic unit than Mr. McKinney who admitted he didn't know. (Rec. 30)

The Record testimony of Mr. McKinney (Rec. 29), Schedule B (Rec. 11) and Government's Ex. 2 (Rec. 45), clearly reflect that the plan of the Secretary of the Army through the Corps of Engineers strictly followed the mandate of Congress in every instance except as to petitioner's land. Schedule B, supra, reflects another area immediately across the reservoir, south,

which was traversed by the same road through petitioner's land, except it is a much longer and irregular peninsula jutting out into the reservoir. This peninsula begins about the center of Section 5 in Township 21 and extends through Sections 32, 29, 20 and 17 in Township 21 to the 700 foot contour level. Attention is directed to narrow portion which extends into the reservoir proper. Your petitioner's land was regular in comparison. Attention is also invited to numerous small necks of lands of peninsula left to private ownership closely adjacent to the 700 foot contour level which can be easily followed and especially is reference made to the narrow tract of land jutting into the reservoir just west of petitioner's land, part of which is in Section 7, at the extreme north end of which was left to private ownership a strip of land 330 feet wide and 660 feet long. These strips will be found in great numbers all over the area strictly following, without exception, the mandate of Congress, yet, because petitioner's land is of small economic value, are his rights not to be considered under the due process clause of our Constitution.

WHERE THE STATUTE CONFERRING THE AUTHORITY LIMITS THE TAKING TO SUCH PROPERTY AS MAY BE NECESSARY FOR THE PURPOSE IN QUESTION, THE QUERY AS TO WHETHER ANY NECESSITY EXISTS FOR TAKING PARTICULAR PROPERTY FOR A SPECIFIC PURPOSE IS ULTIMATELY A JUDICIAL QUES-

TION UPON WHICH THE OWNER IS ENTITLED TO BE HEARD.

While many courts have used sweeping expressions in the decisions in which they have disclaimed the power of supervising the site of public improvements, petitioner urges that a great majority of the decisions have felt bound to interfere to prevent an abuse of the discretion delegated by the legislature by an attempted appropriation of land in utter disregard of the possible necessity of its use or when the alleged purpose is to cloak some sinister scheme; that the District and Courts of Appeal are at variance, and that this Court has not directly passed on the question under the statute authorizing isolated dams and reservoirs as in the instant case; and

That the decision of the Court of Appeals in this case is in conflict with the decision of the Fifth Circuit in United States vs. Richardson, supra. In the Richardson case, supra, the Distsrict Court for the Northern District of Texas entered an order staying proceedings in condemnation by the Government until it complied with discovery process. The Secretary of the Army, among other things, denied that the exercise of his discretion (in taking the Richardson lands) was a subject of judicial investigation or review and that he should not be required to answer the discovery process. The Court of Appeals affirmed the District Court and denied his request for a leave to file a petition for writ of mandamus.

It is further urged that the extent of the taking under the statute involved was limited to the amount necessary to the particular public purpose or use for which the land was sought and that no excessive taking being authorized, no theories, such as the remnant, protective or recoupment theories could be advanced in keeping with petitioner's rights under either the Fifth or Fourteenth Amendments. (Cincinnati v. Vester, C.C.A. 6th, 33 Fed. 2d 242 affirmed in 281 U.S. 439).

Every taking in invitum of private property is subject to judicial determination whether the taking falls within the prescribed limitation—whether in truth it is founded upon public necessity, and if the taking agency has acted fraudulently, in bad faith or with gross abuse of discretion, or has used a subterfuge, or has exercised unsound determining principle, all of which your petitioner thinks is clearly reflected by the record, then petition should be granted to conclude these questions. If the taking was an excessive amount under the limited authority granted, it was not for a public use and such taking would be violative of the Constitution.

It is further respectfully submitted that the Court of Appeals disregarded all factual proof clearly establishing the charges which your petitioner made, as disclosed by the record and opinion of the Trial Court, and that it, in effect, has said regardless of these considerations which it need not decide, they could not

be allowed to control the question of arbitrariness and capriciousness without taking into account the reality.

We urge that with reference to these particular questions, (arbitrariness and capriciousness), they, alone, do not determine the questions involved, and if they did, petitioner clearly established both, not only by the testimony, but by the government's own Schedule B, supra, which uncontrovertibly discloses hundreds of other realities, comparably less favorable, left to private ownership from one end of the reservoir to the other. Government's Ex. 2 (rec. 45) reveals Missouri land on the south side of the reservoir inaccessible by land except around one end of the lake or the other. These Missourians have no access to their county seat except around through Arkansas, yet their lands were consistently left to them. Congress did not delegate such authority as it did to the T.V.A. and as was said by this Court in United States, ex rel T.V.A. vs. Welch, 327 U.S. 546, in referring to the authority granted by Congress to the Authority:

> "This Act does far more than authorize the T.V.A. to build isolated dams. The broad responsibilities placed on the Authority relate to the navigability, flood control, reforestation, marginal lands, and agricultural development of the whole Tennessee Valley. The T.V.A. was empowered to make contracts, purchase and sell property deemed **necessary** or convenient in the transaction * * * * to cooperate with other governmental agencies, federal, state and local, specifically in relation to the problem of readjustment of the population * * "

Congress did not give this authority to the Secretary of the Army in the instant case. The Secretary, through the Corps of Engineers, simply made an arbitrary determination at the trial that petitioner's land was not an economic unit, notwithstanding all the testimony to the contrary, yet, after learning it had left 10 acres of his land on the other side of the reservoir, to avoid embarrassment, abandoned this theory and argued in the Court of Appeals that it could stand on its immunity by declaring a necessity, yet, at the same time it admitted that it knew of no operational use and was going to lease it for Club and Home sites as had been planned before the taking.

The Fifth Amendment provides: "Nor shall private property be taken for public use without just compensation."

This is not a grant of a new power but is a limitation of the power. The taking must be for a public use and then only upon payment of just compensation to the owner. If the facts disclosed by the testimony show that this land was not taken for a public use or was taken for purposes not within the authority, or an amount in excess of the public need was taken, such taking was in violation of petitioner's rights under the due process clause of the Fifth Amendment and without authority of law. (Cincinnati vs. Vester, supra).

The nature of a use, whether public or private, within the power of eminent domain is ultimately a judicial question. (Sears vs. Akron, 246 U.S. 242, Ringe vs. Los

Angeles County, 262 U.S. 700).

The question whether the constitutional provisions against the taking of property for private use has been violated is, like all constitutional questions, ultimately for the courts; and if a court can clearly see that a particular undertaking which it is proposed to clothe with the power of eminent domain has no real and substantial relation to the public use, it is the duty of the court to intervene. (Am. Jur. vol. 18, sec. 46 at page 676. Cincinnati v. Vester, supra; Hairston vs. Danville & W. R. Co. 208 U.S. 598; Shoemaker vs. United States, 147 U.S. 282).

If there was no public use at the time of taking in the sense that the lands were not needed for construction of the dam and reservoir, as found by the trial court, could the reality as described by the Court of Appeals in its opinion, create a public use under the limited authority given by Congress so as to immunize the action of the Secretary of the Army against judicial review, regardless of his arbitrary and capricious action in the first place, and especially, would this one reality create a public use when the taking was an exception and all other realities, similar and worse, existing in hundreds of tracts, were left to private ownership?

It is humbly submitted that the questions raised by this petition should be decided by this Court and a clear enunciation of the law made applicable to the authority granted. There are other dams to be constructed

throughout the country. This Court can take judicial notice that in the beginning of these programs the Corps of Engineers took thousands of acres of land from the tax books which were far removed from any benefit to the reservoirs. They had had little challenge in the courts, but they have announced a new plan of taking under a new directive from the Secretary of the Army (Rec. 229).

Under this new policy the fee acquired will be limited to that land which is subject to permanent or frequent inundation and only flowage easements will be acquired over those areas which are subject to relatively infrequent inundation. The Corps of Engineers has been following an extravagant program or, at least, it did until the Bull Shoals plan was finally fixed, and even the new plan in this reservoir, 140,870 acres were necessary. The first planning here was about as extravagant as the Norfork taking, however, approximately 40,000 acres were eliminated before the final plan was adopted, which plan strictly followed a policy of taking slightly above the 700 foot level, using the jagged boundary line system which is disclosed by government's Schedule B (Rec. 11) and Plaintiff's Exhibit 2 (Rec. 45).

The testimony in this case cannot be said to be conflicting. Only on one point would it have become necessary for the trial court to draw inferences. The government would not admit that the lands were taken for recreation, club and home sites, but admitted that

prior to the taking it mapped the area for such use when it did acquire it, and further admitted such was to be the use. (Rec. 30).

Within the range of reason, what deductions were to be from probative facts was a matter for the trial Judge, and his findings should not have been reversed.

Petitioner, therefore, prays that this court issue its writ of certiorari herein and that the judgment of the Circuit Court of Appeals for the Eighth Circuit, rendered on the 18th day of March, 1954, which became final on the 2nd day of April, 1954, be reversed. (Rec. 231).

Respectfully submitted,
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APPENDIX

Fifth Amendment to the Constitution of the United States.

* * * * nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the Constitution of the United States.

* * * * nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Act of June 28, 1938, sec. 2, 52 Stat. 1215, as amended, provides in part, as follows (33 U.S.C. sec. 701c-1):

* * * Notwithstanding any restrictions, limitations or requirement of prior consent provided by any other Act, the Secretary of the Army is authorized and directed to acquire in the name of the United States title to all lands, easements, and rights-of-way necessary for any dam and reservoir project or channel improvement or channel rectification project for flood control, with funds heretofore or hereafter appropriated or made available for such projects, and States, political subdivisions thereof, or other responsible local agencies, shall be granted and reimbursed, from such funds, sums equivalent to actual expenditures deemed reasonable by the Secretary of the Army and the Chief of

Engineers and made by them in acquiring lands, easements, and rights-of-way for any dam and reservoir project, or any channel improvement or channel rectification project for flood control heretofore or herein authorized: Provided, That no reimbursement shall be made for any indirect or speculative damages; Provided further, That lands, easements and rights-of-way shall include lands on which dams, reservoirs, channel improvements, and channel rectifications are located; lands or flowage rights in reservoirs and highway, railway, and utility relocation.

Constitution of the State of Arkansas (Declaration of Rights) Article 2, Section 8: "No person shall be deprived of life, liberty or property, without due process of law." * * * Section 22: * * * "The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor."

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